(15,326.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 533.

J. S. WINTER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1894.

1 In the Supreme Court of the State of Alabama, from the Chancery Court at Montgomery.

Petition for writ of error in the case of—

J. S. WINTER
v.
"THE CITY COUNCIL OF MONTGOMERY."

To the supreme court of Alabama and the Honorable Geo. W. Stone, chief justice thereof; T. N. McClellan, T. W. Coleman, J. B. Head, and J. T. Haralson, associate justices thereof:

Now comes J. S. Winter, the plaintiff, by Winter & Winter, his att'ys, and prays for a writ of error from the judgment of the supreme court of Alabama (made and finally rendered on the 22nd day of May, 1891, and application for rehearing overruled on the 25th day of June, 1891) to the Supreme Court of the United States, for that the said supreme court of the State of Alabama (being the highest court of law or equity of the said State in which a decision could be had in the said suit) —, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute or an authority exercised under said State, on the ground of their, being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, *and* or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage, hurt, and injury of the said J. S. Winter, as by his complaint and the assignment of errors, hereto attached, fully appears.

WINTER & WINTER,
Att'ys, &c., for the Petitioner, J. S. Winter.

This May 15, 1893.

2 Endorsements: Supreme court of Alabama. Filed May 15, 1893. Sterling A. Wood, clerk.

3 In the Supreme Court of Alabama.

3 Div.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY. } 416.

On consideration of the petition of J. S. Winter for a writ of error in the above-entitled cause to take this cause to "the Supreme

Court of the United States" for a review of the decision made by this court in the said cause, it is ordered by this court that the prayer of the said petition and said writ be allowed.

GEO. W. STONE,
Chief Justice of the Supreme Court of the State of Alabama.

(Endorsement:) Supreme court of Alabama. Filed May 18, 1893. Sterling A. Wood, clerk.

4 STATE OF ALABAMA, }
Montgomery County. }

In the Supreme Court of the State of Alabama.

J. S. WINTER, Plaintiff in Error,
v.
THE CITY COUNCIL OF MONTGOMERY, Defendant in Error.

Know all men by these presents that we, J. S. Winter, Jno. Gindrat Winter, Sallie G. Thorington, Lucy W. Lahey, are held and firmly bound unto the above-named "The City Council of Montgomery" in the sum of five hundred dollars, to be paid to the said "The City Council of Montgomery;" and for the payment of which, well and truly to be made, we hereby bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the — day of May, A. D. eighteen hundred and ninety-three.

Whereas the above-named J. S. Winter has sued out a writ of error to the Supreme Court of the United States to reverse the judgment of the supreme court of the State of Alabama rendered in the above-entitled suit: Now, therefore, the conditions of this obligation is such that if the above-named J. S. Winter shall prosecute the said suit to effect and answer all damages and costs if he fails to make his said plea good, then this obligation shall cease and be void; otherwise the same shall be and remain in full force and effect.

J. S. WINTER. [SEAL.]
JNO. G. WINTER. [SEAL.]
SALLIE G. THORINGTON. [SEAL.]
LUCY W. LAHEY. [SEAL.]

Signed, sealed and delivered, taken, and acknowledged this the 15th day of May, A. D. 1893, before me, a notary public in and for the county of Montgomery and State of Alabama.

N. B. HOLT,
Notary Public.

5 Approved May 15th, 1893.

GEO. W. STONE,
Chief Justice, Supreme Court of Alabama.

(Endorsement:) Supreme court of Alabama. Filed May 18, 1893. Sterling A. Wood, clerk.

6 THE UNITED STATES OF AMERICA, ss:

To the city council of Montgomery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Joseph S. Winter is plaintiff in error and The City Council of Montgomery is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of May, 1893.

(Signed) GEO. W. STONE,
Chief Justice of the Supreme Court of the State of Alabama.

THE STATE OF ALABAMA, }
Judicial Department. }

The supreme court of Alabama to any sheriff of the State of Alabama, Greeting:

You are hereby commanded to serve the above and foregoing citation upon the city council of Montgomery and due return make hereof to said the supreme court of the State of Alabama how you have executed the same.

Witness Sterling A. Wood, clerk of the said supreme court, in the city of Montgomery and State of Alabama, this the 18th day of May, A. D. 1893.

(Signed) STERLING A. WOOD,
Clerk of the Supreme Court.

7 (Endorsements:) Supreme court of Alabama. Filed May 18th, 1893. Sterling A. Wood, clerk. Received in office 20th May, 1893. W. R. Waller, sheriff. Executed by serving a copy of the within on Jno. G. Cromelin, as mayor of the city of Montgomery, Alabama, May 20th, 1893. W. R. W-ller, sheriff, per D. G.
8&9 Jones, D. S. 3 div. 416. Filed December 19th, 1890. Sanford, clerk. Joseph S. Winter, appellant, *v.* The City Council of Montgomery, appellee. Appeal from Montgomery chancery court. Dec. 19th, 1890. Submitted on briefs. May 22, 1891. Affirmed. Walker, J.

10 *Original Bill.*

STATE OF ALABAMA, }
Montgomery County. }

In the Chancery Court of Montgomery County.

To the Hon. Jno. A. Foster, chancellor:

Humbly complaining, your orator, Joseph S. Winter, of said State and county, respectfully shows unto your honor:

I. That he is a resident citizen of the State and county aforesaid,

over the age of twenty-one years, and that as trustee and agent for his wife, Mary E. Winter, he was, on the — day of ——, 1886, in the quiet and peaceable possession of that certain premises and property at the corner of Court street and Dexter avenue, known as "the Gindrat corner," on which are buildings occupied as stores of great actual and rental value belonging to the wife aforesaid of the said Winter as her separate property.

II. That beneath the sidewalks on either side of said property was constructed by the said J. S. Winter, as the agent and trustee aforesaid of the said Mary E. Winter, in 1870 or thereabouts, compartments about 140 feet in length and about 14 feet in width at a cost of about $7,000, these having a length on the Court-street side of the said property of about 85 feet, and divers side windows for lighting the abutting booths and its basement of about 60 by 75 or 80 feet dimensions, and a story of not less than 10 feet height between floor and ceiling; that, as a facility for getting into and out of said basement story and the rooms beneath the sidewalk aforesaid, with compartments connected at suitable intervals with each other and by suitable and the necessary doors and windows, the entire basement, so described, was fitted up at great cost of time and money; was well lighted and ventilated by the various means employed to effect it, including, among other expedients, that of side lights all round—just below the parapet wall all round and just above the street grade to suit—and that the basement so constituted at one time rented for $3,600 a year and was at the time so named of great rental value and indispensable to the building above it, as will be shown by the proof in the cause duly made.

III. That the excavation of the land beneath the sidewalk so described necessitated the covering of the same with a suitable floor or other walk to provide thereby "a good and sufficient pave-
11 ment" or sidewalk in all respects, and that by and with the consent (in writing, made and given and assented to by the parties respectively the said complainant, as agent of the owner in such behalf, caused to be excavated at great cost and expense the dirt around the said buildings on either and each of said streets, Dexter avenue (then Market street) and Court street, aforesaid for a distance of about 140 or 150 feet, of width about 14 or 15 feet, and of depth about 12 feet, and with object to make the basement beneath the buildings concerned correspond a correspondingly excavation was effected of the earth, &c., as far as necessary to accomplish it, and thus was finally secured a basement story under the said sidewalk and said buildings of great real and rental value, the entire basement having been leased at one time for $3,600 a year.

IV. That to complete and make as it should be the plan devised and agreed upon by the complainant and the said defendant and give due effect thereto it was agreed by and between the parties that steps on the sidewalks of the said Market and Court streets respectively should be constructed as a means of communication between the basement so described and the sidewalks aforesaid and various windows and other openings provided and supplied on either side for the entire length of the buildings on each side; also

side openings, connected with each other by columns between, of not more than three feet throughout the entire 140 feet aforesaid, these openings being, in fact, a succession of transoms of about 18 inches wide and of three feet length, shedding light and affording ventilation to the basement beneath throughout, they being on the outer side of the sidewalk when completed and just below it—say 8 or 10 inches; that the said openings were essential, if not indispensable, to the ventilation of the said basement story both beneath the sidewalk and the said buildings throughout and were thus employed as a means of preserving from rot and decay the timbers of the said building, its floors, &c., and as a sanitary provision alike valuable throughout.

VI. That under the agreement aforesaid the construction of the premises and improvements so designed and proposed was fully effected and completed to accord therewith, and that the said owner was for more than ten years—as the period of adverse possession of lands in Alabama barring recovery by the owner—in peace-
12 able enjoyment of the said basement and basement connections throughout, and that the same was maintained in good order and condition throughout until, by force and arms and without other proceedings than the clandestine passage of an ordinance passed in secret session and intendedly without any sort of notice to the complainant or the owner of said property, it was demolished by the street forces of the said defendant, acting under its orders and commands, as expressed & declared, by said ordinance, & the said basement beneath the sidewalk "filled in," and, in addition thereto, a space on the property side of Court street aforesaid, upon which now rest the steps leading into the story of the said building next above the street story aforesaid, alike filled in, though, as aforesaid, forming a part of the story beneath the building of four feet width aforesaid, and thus the light and ventilation on said Court street supplied by the openings aforesaid between the line proper of the said sidewalk on said Court street and the line proper of the said buildings on said Court street was totally cut off and destroyed, to the destruction of rights and privileges before enjoyed by the owner in fact of said property since 1854 and many years longer by the parties before in the ownership and enjoyment of said property, and that at the same time was filled "solidly in" by the said defendant, through its said street force, the entire openings and means of every kind, of light and ventilation, on said other front of the said building, and thus the basement beneath the said buildings was also rendered valueless and has been thus deprived of all light and ventilation as aforesaid; that as the result there now remains a single opening on the two fronts, the same being on Court street aforesaid.

VI. That the light and ventilation so cut off on Court street aforesaid were four feet off and away from the said street and otherwise within the control or right of use of the said defendants, and that the trespass so charged was without any authority of law whatsoever; that the said city council so directing and ordering the same were prompted thereto by its personal hostility to complainant, and

that the store property so described has been and is damaged by the invasion charged many thousands of dollars; that its rental value as a whole has been impaired not less than one-third
13 and so reduced to two-thirds of its prior rental value by the acts so charged of said defendant, city council.

VIII. That the defendant, after displacing the sidewalk so described, filled up the opening beneath with wet dirt taken from the different points of the city, and on that was soon thereafter put down a particular pavement, known as the "Schillinger pavement," the sole and exclusive right to use which was owned by the said defendant, and that, as was predicted by persons experienced in such matters, the pavement so prematurely put down soon sunk out of sight and is still going down, while nothing now remains but a sand sidewalk, with the said Schillinger pavement a foot or more below its surface.

IX. That a copy of the sections of the city charter at such time in force relied on for the authority to make the contract with said complainant as shown aforesaid is attached hereto, marked "Exhibit A," with leave craved of the court to refer to the volume last printed of the city code for such further information to the court as may be necessary to ascertain and determine the right and authority of the said city council in the premises and throughout as the representatives of the city charged with the power and duty of regulating and otherwise dealing with the streets and sidewalks of the city, and also of reference to such other of the city codes published by authority of the said city council since the year 1850 for like objects, and in illustration, so far as it may serve that purpose, of the rights and powers conferred by law on the said defendants, the said city council, so far as these concern the case before the court.

X. That the abuses so charged by complainant are now and have since been in full force, the complainant being by force and arms prevented by defendant from changing or altering the status of the sidewalks by defendants aforesaid, and are day by day, therefore, of the greatest damage to complainant and the owner of the said property; that as the husband and agent aforesaid, by reason of said relation, the said owner, complainant, who by the laws of Alabama was and is entitled as such husband to the management and control of the estate so concerned and to the rents and profits of and from the same without liability to account, has been since November, 1854, so in charge of the same and now is; that the demolition of the interest complained of was upon the pretext (wholly unsupported,
14 complainant charges and avers) that the sidewalk was in a dangerous condition and unsafe, therefore, as a sidewalk, and that to leave it there was to risk the limbs and lives of those passing over it, and that it was incapable of repair; that the only resource was to destroy it, fill in the excavation with dirt or other necessary material, and, in fact, to treat the subject as shown by the complainant it was done, and all of which is denied by complainant; and complainant further charges and alleges that the sidewalk as constructed and placed and as it existed at the dates and times of the matters considered could have been easily repaired in the

respects actually needing repair; that fifty dollars or less money would have been all that was necessary to put the said sidewalk throughout in complete and thorough repair in all possible respects, and that complainant on repeated occasions for more than a year before had endeavored to effect the repairs that were suggested as necessary by defendant (but never needed in point of fact) by the appearance of the said pavement—in fact, for a longer time—and that on each occasion he was forced to desist, his workmen on two occasions being arrested for attempting to do the needed work, under the pretense of the authority supplied by an ordinance of the said council—unwise as arbitrary, complainant submits and charges—forbidding the repair of all sidewalks within certain limits (limits within which the property so concerned was situated) when out of order, but that when needing repairs, however limited or insignificant, demanding and commanding and requiring that the sidewalk entire should and must be taken up and a new and wholly different sidewalk put down, and that the same should and must be made of a far more costly concrete known as the "Schillinger pavement," as hereinbefore described, of which the sole right of use was in the said city council as aforesaid; and complainant charges that the said sidewalk ordinance was arbitrary and without reason, was an invasion of natural rights no less than the constitutional rights, guaranteed by both the Federal and State Constitutions, of the citizen, who, bound to keep in good order and condition the sidewalks adjoining his buildings on the streets of the municipality, could be legally required, complainant submits, to do no more than supply "a good and reasonably sufficient sidewalk," and the same maintain and keep in good repair and order, he effecting the latter in his own way, provided, when repaired, its good order and condition was thereby restored, and to be reasonably considered as in the condition to be properly demanded, to wit, "in good order and repair throughout."

XI. That the said city council, defendant, by way of fortifying itself for the work of demolition so proposed and so at last effected, or for other reasons not known to complainants, passed, in advance of perpetrating the injury aforesaid, [an ordinance,]* a copy of which is appended, marked "Exhibit B (C);" that the effect of such ordinance, or its intended effect, was to make nugatory and so "impair" the force of the contract evidenced by resolution or ordinance, a copy of which is appended, marked "Exhibit C (B)," and under which the agreements so before set out were made and entered into or by which they were evidenced, in violation of the Constitution of the United States, article II, section 10, clause 1, providing that "no State (hence no constituent part of a State) shall pass any law impairing the obligation of contracts," and so in violation of complainant's rights and the rights of the owner of the property aforesaid under said contract, guaranteed by both the Federal and the State Constitutions concerned, and that the state of things brought about

[* Word enclosed in brackets erased in copy.]

by the acts and things charged aforesaid of the said defendants continued by force and arms and are now existent and a continual and continuous injury to complainant and the owner of the property aforesaid and the property so concerned, in fact, to its hurt and damage daily and day by day of not less than 8 to 10 dollars, complainant charging this as a matter of information and belief, & the same being, upon such information and belief, so charged.

XII. Wherefore, and for the reasons so stated and set out, complainant prays the intervention of your honor and for relief that your honor will restrain by the proper order in this behalf the said complainant from all further interference with complainant in his enjoyment of the premises and property so concerned and described, and that defendant be ordered to restore and put in the condition found or some equivalent condition the premises and property described when trespassed upon, as aforesaid, and the same do at its own proper cost and expense in all respects and without unnecessary delay in that behalf; and, further, that your honor refer it to the register of this honorable court to ascertain by the 16 taking of the needed proofs in such behalf the damage done the property aforesaid by the trespasses charged aforesaid, and duly assess the same for the information of the honorable court, and that your honor will award complainant all such damages as may have been or may be suffered by reason of the premises to be paid and liquidated by the said defendant, and for such other and further relief as to your honor may seem meet, proper, equitable, and just; and your petitioner, as in duty bound, will ever pray, &c.

WINTER & WINTER,
For the Complainant.

Foot-note.

The defendant is required to answer each and every of the paragraphs severally of the foregoing bill of complaint from one to twelve, inclusive, and to answer the same on oath.

WINTER & WINTER,
Solicitors for the Complainant.

STATE OF ALABAMA, *Montgomery County,* } ss:

Personally appeared before me J. S. Winter, who, being duly sworn, deposeth and saith that the statement of facts set out in the foregoing bill of complaint is true when they are set out as facts, and that when made on information and belief he believes them to be true.

J. S. WINTER.

Sworn to and subscribed before me this the 8th of April, 1889.

E. R. HOLT, *Clerk.*

In Chancery at Montgomery.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY.

It is hereby agreed by counsel for the complainant and the defendants, respectively, that the complaint filed of date herewith, subject to such amendments during the present term as may
17 be desired, shall and will be considered and held as the substitute in all respects of the original complaint therein, which it is conceded is lost or mislaid; that the exhibits referred to in the complaint so this day filed may hereafter be supplied, and that a formal answer may and shall be filed hereafter during the term by the defendant should it become or thought by the defendant necessary, and that the case presented by the complaint may be considered on its objections for any cause for insufficiency in law, with privilege to the defendant and the obligation on his part to specify his points of demurrer during the time, and that any informality that exists in the complaint as presented may be cured by amendment during the present term of the court and considered as originally found and contained in said complaint.

WINTER & WINTER,
For Compl't.
J. M. FALKNER, *For Resp't.*

April 8, '89.

Allowed to be substituted and filed in open court April 8, '89.
V. M. ELMORE, *Register.*

EXHIBIT A.

Extract from an act to incorporate the city of Montgomery passed by the legislature of Alabama and approved the 23rd day of December, 1837.

SEC. 14. And be it further enacted that the city council of Montgomery shall have full power and authority to make ordain and enact such laws and regulations not contrary to the laws and constitution of this State as may be deemed necessary in relation to the streets and highways, public buildings and powder magazine and every other matter and thing which they may deem necessary to the good order and welfare of said city.

19 *Copy of Report of Special Committee to the City Council of Montgomery.*

MONTGOMERY, ALA., *July*, 1870.

The undersigned, a special committee on the subject, appointed by the city council of Montgomery with power to act, hereby authorize J. S. Winter, as trustee, &c., to proceed with the improvement on the corner of Court and Market streets, in said city, ex-

hibited by the sketch annexed and according to the plan so exhibited—the same contemplating the excavation of the sidewalk around or bordering the store or building known as "the Gindrat corner," and the use below of the apartment thereby to be formed for business purposes, with entrance thereto such as are seen on the plan annexed; the sidewalk to be replaced to accord with the annexed plan with a good and substantial pavement, and the work so to be done with as little practical interruption as may be found practically expedient, and, after being commenced, to be finished without unnecessary delay.

Witness our signatures as committeemen year and date aforesaid.

(Signed) H. E. FABER.
L. J. WILLIAMS.
T. J. SCOTT.

(Here follows diagram marked p. 18.)

EXHIBIT C.

Called Meeting.

CITY COUNCIL, *Aug.* 18, 1883.

Present: His honor the mayor, Alderman W. B. Jones Hannon, T. H. Carr, Thos. G. Jones, Sharp, Fleming, and Williams; Alderman Thos. G. Jones in the chair.

His honor the mayor offered the following ordinance:

Resolved, That all pavements laid in future on Commerce street, Court square, and Market streets, on Court and Perry, between Washington and Monroe streets, and Montgomery so far southwest as Lee street shall be in stone of uniform size as far as practicable and not less than three by two feet, with upper surface chisel-dressed to a plane and all edges chisel-dressed and meeting the upper surface in straight lines or in artificial stone or concrete approved by the council, and that when any pavement on the streets or parts of streets above mentioned now laid in brick or other material than those mentioned gets out of repair it shall be taken up and relaid as above directed. On motion, the rules were suspended and the ordinance was put upon its final reading. On motion of Alderman W. B. Jones, the ordinance was adopted.

Amended Bill.

STATE OF ALABAMA, }
Montgomery County. }

In Chancery at Montgomery.

J. S. WINTER
v.
THE COUNCIL OF MONTGOMERY.

Come the complainant in the said cause and moves the court that the decree rendered thereon be set aside, and that then the complain-

Exhibit B.

Bowman Street

Committees Report

over

No. 588.
Winter
Montgomery
p. 18

ant be allowed to amend the bill of complaint in said cause, as shown by the paper presented, setting out said amendment attached hereto, marked Exhibit "A;" and the said complainant will ever pray, &c.

WINTER & WINTER,
For the Complainant.

April 11, '89.

EXHIBIT "A."

STATE OF ALABAMA, }
Montgomery County. }

In Chancery at Montgomery.

J. S. WINTER }
v. }
THE CITY COUNCIL OF MONTGOMERY. }

Comes the complainant, by leave of the court, and, by way of amendment to the original bill filed in this cause, further says and avers:

1st. That the said defendant, the said City Council, by its officers and agents in that behalf, have notified and warned the said complainants from time to time since the commission charged on the original bill of the acts complained in said bill and the acts of trespass therein set out that he must not make any openings of any kind in the side walls on either street of the build-
21 ing so concerned, or restore any openings of any kind before in said walls on either side of the said buildings for purposes of and with object or as a means of supplying light or ventilation or for other purposes to the basement story beneath the said building, nor restore the steps there before in use on either side as a means of access and egress to said basement story from or to the sidewalk described in said original bill, and that if attempted that complainant would be prevented by force and arms therefrom; that since 1870 and up to the time of the acts of trespass aforesaid, to wit, in the fall of 1886, complainant was in the use and enjoyment of two pair- of steps, erected for the purpose so named, on the Court-street side of the said building, each commencing about the center of the building on said street, the one running north down into the said basement story with an opening or "well hole" of about 15 ft., and the other running southward down into said basement story with an opening or "well hole" of about the same length or distance, and both running along under the said side wall of said building, and each being of width about 3½ or 4 ft., more or less; that around these "well holes" was a railing or fence on property belonging to the owner of the said building, the said Mary E., as before stated, and acquired as shown in the said original bill. This fence or railing defining, as complaint alleges, the possession and claim of the said owner and its actual manual possession the while asserted and maintained "*possessio a pedis*" against all the world, to wit, since the year aforesaid, 1870; and, further, that the steps before de-

scribed in the original bill alongside said main wall and of about 4 ft. width, more or less, were also in the possession and control, all the while, for the same period for use entirely of the said owner and within her regulation and control as a means of getting from the sidewalk to the offices of various kinds in the story above and landing on the verandah to be found, as averred, on the 2nd and 3rd stor*ys* above on the said Court-street side of said building, there leading through the proper openings severally into each story concerned; that in point of fact the complainant's possession as against the world and therefore adverse to the defendant by being *being* excluded for the entire length of the building on the Court-street
22 side aforesaid by its occupation and otherwise, was continuous up to the time so mentioned since 1870. Thus its occupation for fruit stands and such like purposes by parties who paid rent to the complainant as agent therefor in each case for such use and otherwise was complete and entire, and this with th*is* knowledge of the said city council; and that the said defendant, as a further fact of the case, caused to be taken away such fruit stands and forbade and continues to forbid the said complainant and the said owner from replacing said fruit stands; and thus, while there is no actual possession asserted or claimed by the said defendants of the premises so described and occupied as aforesaid since the acts of trespass and interdiction aforesaid—no actual occupation by the said defendant (nothing to be termed "*possessio pedis*")—complainant has all the while been threatened and warned not to, himself, make any use of such unoccupied premises under penalty as aforesaid, and has by such threats been and is now prevented from making any use whatever of the premises on which were such steps and openings therewith connected as before set out, connected and alike of the land before occupied otherwise as aforesaid as the property of the said Mary E., by complainant and for her, and all of which property and land (the same being about 4 feet width) is without and east of the street line proper (and so claimed by defendant of the city council), and is thus the property in point of law and fact of the said Mary E., all of which will be shown by the necessary proofs in that behalf on the trial of the cause, so that complainant, while never technically evicted the premises so described as being without the line of the said Court street, nor denied going thereon, is by the said defendants by force and arms restrained and prevented from making any and all openings on the said Court-street wall, greatly to the damage and injury of complainant and the owner aforesaid and to the great damage, injury, and danger of the building concerned from the exclusion of all light and ventilation as aforesaid; and is also alike prevented from making any openings, as before alleged, in said premises by the interdictions and threats aforesaid of the said defendant, and with like serious injury and danger aforesaid to complainant and the owner aforesaid, viz., to the damage of each the sum of ten thousand dollars or other larger sum.

SEC. 2. And complainant further alleges that the treatment
23 of complainant so complained is arbitrary and unreasonable

and without any good and sufficient reason whatever; that to no other building on the said street, which is the principal business street of the said city, nor any other street of the said city has a like rule or any like treatment been applied or extended; that buildings since erected within said city, and notably to that which is being put up on an opposite corner and diagonally across, full privilege has been granted for improvements on the sidewalks, and thus on premises, a part of the easement in the city, for sidewalk purposes; and that no good and sufficient reason has been suggested or is to be for making the complaint- herein or the said Mary E. Winter an exception by denying like privileges to her, as complainant alleges has been and is being done as aforesaid; and less, complainant humbly submits, for preventing as alleged her use for the purposes stated aforesaid, and as a means of saving from destruction the buildings concerned of the property and premises aforesaid, which is without and outside as alleged of the street aforesaid of a property which was never claimed as averred as its property by the said city council, and never as averred to have rightly been so claimed; but all the while claimed, and rightly claimed, to be the ownership and property of the Mary E. as aforesaid with every reasonable right of use thereof.

For the complainant, WINTER & WINTER.

Foot Note.

The defendant is required to answer each and every paragraph of this amendment to bill from 1 to 2, inclusive.

WINTER & WINTER,
For Compl't.

STATE OF ALABAMA, }
Montgomery County. }

J. S. Winter, being duly sworn, deposeth and saith that the matters and things set out in the foregoing amendment of the original bill filed in the cause exhibited are true when averred as matters of fact and when averred on information and belief he believes them to be true.

24 J. S. WINTER.

Subscribed and sworn to the *the* 11th day of April, 1889.
V. M. ELMORE, *Register.*

Decree Ap'l 10, '89.

In Chancery at Montgomery, Ala., Spring Term, 1889.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY.

This cause was submitted for decree at the present term of the court on the motion of the defendant to dismiss the bill for the want of equity, and on consideration it is ordered that there is no equity

in the bill, and the same is hereby dismissed out of this court. Let the complainant pay the costs of this suit, for which execution may issue. The bill depends for its equity on two propositions. It seeks to compel defendant to restore the sidewalks to the same condition in which it was before it was filled up and covered by order of the complainant. In deciding whether he is entitled to have this done the court on this motion cannot look outside the bill and the ordinances and other exhibits to the bill. It does not seem to the court that when regard is had to all the findings and ordinances of the council we can correctly conclude that the action of the defendant was an arbitrary and unreasonable exercise of the discretion given by law over the streets and sidewalks of the city.

The complainant also seeks redress for a trespass upon a strip of land lying between the sidewalk and his building.

But if a trespass has been done to complainant by these acts he has a full and adequate remedy at law. This defense can be interposed by demurrer as well as by motion to dismiss the bill for want of equity. There is no equity in a bill which shows on its face that complainant has a complete and adequate remedy at law.

Montgomery, Ala., April 10th, 1889.

JNO. A. FOSTER, *Chancellor.*

25 *Decree, Ap'l* 11, '89.

In Chancery at Montgomery, Ala., Spring Term, 1889.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY.

The complainant makes application to the court for leave to file an amendment to the bill after setting aside the decree rendered at the present term of the court on motion to dismiss the bill for want of equity. Upon an examination of the proposed amendment it appears that there would be no equity in the bill if the same be filed. It appears therefore that it is within the discretion of the court whether to allow the amendment to be filed or to admit it to the file and then again to dismiss the bill for want of equity. In order that the complainant may have the full benefit of the bill as amended, it is hereby ordered that complainant be allowed to file said amendment, and for that purpose the decree is set aside and vacated, and now, on consideration of said bill as amended, it is ordered, adjudged, and decreed that there is no equity in the bill and the same is hereby again dismissed for want of equity. The only additional matter introduced as a reason for retaining the bill consists in the charge that defendant has committed and threatened to commit a trespass upon the complainant by refusing to allow him to make openings on a wall in the sidewalk or near thereto. It does not appear that such act of trespass is such a one as is irreparable injury to complainants and such a one as, under the charter and ordinances of the city, they have not the right to do in the exercise of the power conferred on the city council.

Let complainant pay the costs of this suit, for which execution may issue.

JNO. A. FOSTER,
Chancellor.

Montgomery, Ala., April 11th, 1889.

Security for Costs.

STATE OF ALABAMA, }
Montgomery County. }

In Chancery at Montgomery.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY. } 1659.

26 Whereas the aforesaid Joseph S. Winter, the complainant in the cause aforesaid against the said City Council of Montgomery, as respondent, in the chancery court at Montgomery, decided at the April term, 1889, of the said honorable court by his honor the chancellor adversely to the said complainant, hath applied to the register of the said chancery court, V. M. Elmore, for an appeal from said decision to the honorable supreme court of Alabama; and whereas the application so made has been granted, upon the conditions by law made and prescribed, to the first Monday of the term of the said supreme court next after the expiration of twenty days from the date of this appeal:

Now, therefore, we, Lucy W. Lahey, widow, over 21 years of age, and Sallie G. Thorington, widow, over 21 years of age, and each and both of us resident citizens of the city of Montgomery and State of Alabama, holding and owning in our own right, each, income-bearing real estate in said city of more than ten thousand dollars cash value over and above all incumbrances thereon and of joint value more than twenty thousand dollars net of all incumbrances thereon, and we, Jno. Gindrat Winter, Willis L. Chandler, and William T. Chandler, do hereby acknowledge ourselves security for all the costs and all costs of said appeal, and to the payment of the same hereby bind ourselves, our heirs, executors, administrators, and assigns, *and* firmly by these presents, as witnesses our hands and seals, respectively, this the 10th day of April, anno Domini eighteen hundred and ninety.

L. W. LAHEY. [SEAL.]
S. G. W. THORINGTON. [SEAL.]
JNO. GINDRAT WINTER. [SEAL.]
WILLIS L. CHANDLER. [SEAL.]
WILLIAM T. CHANDLER. [SEAL.]

Witness to the signatures of Lucy W. Lahey and Sallie G. Thorington:

MARY E. WINTER.
J. S. WINTER.

Witness to the signature- of Jno. Gindrat Winter, Willis L. Chandler, and William T. Chandler:
J. S. WINTER.

Approved this 10th day of April, 1890.
V. M. ELMORE, *Register*.

27 *Notice of Appeal.*

In Chancery at Montgomery.

J. S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY.

To J. M. Falkner and W. S. Thorington, sol's for defendants:

Whereas complainant has prayed for and obtained an appeal to the supreme court of the State of Alabama from the decree rendered in the above-stated cause by the chancery court for the sixth district of the southeastern chancery division of the State of Alabama on the 11th day of April, 1889, and has given bond for costs of appeal, said appeal being made returnable to the first Monday in May, 1890:

Now, therefore, you are hereby cited to appear at the supreme court of the State of Alabama on the first Monday in May, 1890, and defend on said appeal if you think proper so to do.

Witness my hand this 12th day of April, 1890.
V. M. ELMORE, *Register*.

Received in office April 12th, 1890.
W. D. WESTCOTT, *Sheriff*.

Executed by serving a copy of the within notice on J. M. Falkner and W. S. Thorington this the 12th day of Ap'l, 1890.
W. D. WESTCOTT, *Sh'ff*,
By C. E. PARKS, *D. S.*

Register's Certificate.

STATE OF ALABAMA,
Montgomery County.

I, Vincent M. Elmore, register of the chancery court for the sixth district of the southeastern chancery division of the State of Alabama, composed of the county of Montgomery, and by law the keeper and custodian of the books, record, and proceedings of said court, hereby certify that the foregoing pages, numbered from one to thirty-two, both inclusive, contain a full, true, complete, and correct transcript of the record and proceedings of said court in a cause lately pending therein in which Joseph S. Winter is com-
28 plainant and The City Council of Montgomery is respondent, as the same appears of record and on file in my office as such register; and I further certify that the said Joseph S. Winter, complainant, did apply for and obtain an appeal from the decree of

said court made in said cause, returnable to the supreme court of the State of Alabama on the first Monday in May, 1890, and that Lucy W. Lahey, Sallie G. Thorington, Jno. Gindrat Winter, Willis L. Chandler, and William T. Chandler *as* sureties for the costs of said appeal.

Witness my hand this the 16th day of Dec'r, A. D. 1890.

V. M. ELMORE, *Register.*

29 *Assignment of Errors.*

Comes the appellant and says that there is manifest error in the record and proceedings of said chancery court and assigns the following errors:

1. The court erred as shown in the decree rendered in said cause on the 10th day of April, 1890.

2. The court erred as shown in the decree rendered in said cause on the 11th day of April, 1890.

3. The court erred in not holding that the ordinance of the city council of Montgomery set out as Exhibit C to original bill impaired the obligation of the contract set out as Exhibit B to the original bill.

4. The court erred in not holding that the acts of The City Council, respondent, as set out in said bill, deprived the complainant and Mary E. Winter, the owner of the corpus, of the interest and property described "without due process of law."

WINTER & WINTER,
Att'ys for Complainant.

30 Supreme Court of Alabama, November Term, 1892–'93.

3 Div.

JOSEPH S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY. } 416.

Appeal from Montgomery chancery court.

WALKER, *J.:*

It appears that the pavement on the Court-street and Dexter-avenue sides of the building described in the bill was taken up by the complainant many years ago under permission granted by the city council, the sidewalk was excavated its entire width, the basement of the building was extended under the sidewalk, and another pavement was built by complainant over the excavation. The matters complained in the bill are, in brief, that the city authorities have removed the pavement and the structure thereunder erected by complainant; have filled in said excavation and built a new and different kind of pavement; have excluded complainant from his use, in connection with and as a part of the building, of a portion of the sidewalk which had been possessed and enjoyed by him for many years; and the bill shows that said property has been dam-

aged and its value depreciated in consequence of the acts complained of. The purpose of the bill is to have the defendant enjoined from all further interference with complainant's use as a part of the property of that portion of the sidewalk adjoining the building, that defendant be required to restore said sidewalk and the excavation thereunder to their former condition in reference to said building, and that damages be awarded to complainant for the alleged injuries to said property.

In Winter *v.* City Council of Montgomery, 83 Ala., 589, it was held that there was nothing averred in the bill in that case to impart the qualities and elements of a contract to the authority granted by the defendant to the complainant to make said excavation under the sidewalk and to improve his property in connection therewith. We discover nothing in the averments of the bill in this case to authorize the treatment of that authority as a con-
31 tract. Conceding, however, that complainant's right to the use of the excavation under the sidewalk and of portions of the sidewalk in connection with the building were secured to him by contract, and that the acts of the defendant which are complained of were wrongfully and wholly unauthorized; still we are unable to discover any ground for equitable relief. Upon no construction of the bill as amended can it be claimed that anything more is shown than the commission by the defendant of wrongs or torts involving damage to property. That damage may be ascertained and reparationt herefor had in a court of law. Though the necessity of keeping corporations from overstepping their delegated powers may justify the issuance of an injunction on a state of facts which in the absence of this special feature would not authorize such extraordinary remedy, yet, even in such a case, the court will not intervene by injunction when there is a failure to show that a court of law cannot afford all necessary relief. East. & West. R. R. Co. *v.* East Tenn., Va. & Ga. R. R. Co., 75 Ala., 275. In the bill as amended in this case there is no averment of irreparable injury, and on the facts as stated it is plain that the alleged injury to the property is such as may be compensated for in a court of law by a judgment for damages. As there is no allegation of any special fact or circumstance affecting the adequacy of this plain legal remedy, the conclusion is inevitable that the bill as amended is without equity. Cross *v.* Mayor, 18 N. J. Eq., 305; Holmes *v.* Jersey City, 12 N. J. Eq., 310; 1 High on Injunctions, § 588.

Affirmed.

32 Supreme Court, Friday, May 22nd, 1891.

The court met pursuant to adjournment.
Present: All the justices.

Montgomery Chancery Court.

JOSEPH S. WINTER
v.
THE CITY COUNCIL OF MONTGOMERY.

Come the parties, by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of said chancery court there is no error. It is therefore considered that the decree of said chancery court be in all things affirmed. It is also considered that the appellant and L. W. Lahey, S. G. W. Thorington, John Gindrat Winter, Willis L. Chandler, and William T. Chandler, sureties on the appeal bond, pay the costs of appeal in this court and in the chancery court.

33 THE STATE OF ALABAMA,
Judicial Department.

The Supreme Court of Alabama.

THE STATE OF ALABAMA,
Montgomery County, } *ss:*

I, Sterling A. Wood, clerk of the supreme court of Alabama, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to —, inclusive, contain a true copy of the record and of the assignment of errors and of all proceedings had, together with a true copy of the opinion or opinions filed in said court, in the cause of Joseph S. Winter, plaintiff in error, against The City Council of Montgomery, defendant in error, as the same appear and remain of record and on file in said office.

Seal of the Supreme Court of Alabama.

In testimony whereof I have hereunto set my hand and affixed hereto the seal of the said court this twentieth day of May, in the year of our Lord one thousand eight hundred and ninety-three.

STERLING A. WOOD,
Clerk of the Supreme Court of Alabama.

34 THE UNITED STATES OF AMERICA, *ss:*

To the city council of Montgomery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Joseph S. Winter is plaintiff in error and The City Council of Mont-

gomery is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of May, 1893.

GEO. W. STONE,
Chief Justice of the Supreme Court of the State of Alabama.

THE STATE OF ALABAMA, }
Judicial Department. }

The Supreme Court of Alabama.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to serve the above and foregoing citation upon the city council of Montgomery, and due return make hereof to said the supreme court of the State of Alabama how you have executed the same.

Witness Sterling A. Wood, clerk of the said supreme court, in the city of Montgomery and State of Alabama, this the 18th day of May, A. D. 1893.

STERLING A. WOOD,
Clerk of the Supreme Court.

35 [Endorsed:] Rece'd in office 20th May, 1893. W. P. Waller, sh'ff. Executed by serving a copy of the within on John G. Crommeline as mayor of the city of Montgomery, Alabama, May 20th, 1893. W. R. Waller, sh'ff, per D. G. Jones, D. S. Original citation. Supreme court of Alabama. Filed May 18, 1893. Sterling A. Wood, clerk.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the hon. judges of the supreme court of Alabama, Greeting:

Because in the record & proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Alabama, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in *in* the said suit between J. S. Winter and The City Council of Montgomery, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, treaties or laws of the United States, & the decision was in favor of their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States & the

decision was against the title, right, privilege, or exemption
37 specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said J. S. Winter, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then & there held, that, the record & proceedings being inspected, the said Supreme Court may cause further to be done therein to correct said error what of right and according to the laws of the United States should be done.

38 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred & ninety-three.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—

GEO. W. STONE,
Chief Justice of the Supreme Court of Alabama.

Endorsed: ——.

Endorsed on cover: Case No. 15,326. Alabama supreme court. Term No., 533. J. S. Winter, plaintiff in error, *vs.* The City Council of Montgomery. Filed May 27th, 1893.

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 533.

J. S. WINTER, PLAINTIFF IN ERROR,

vs.

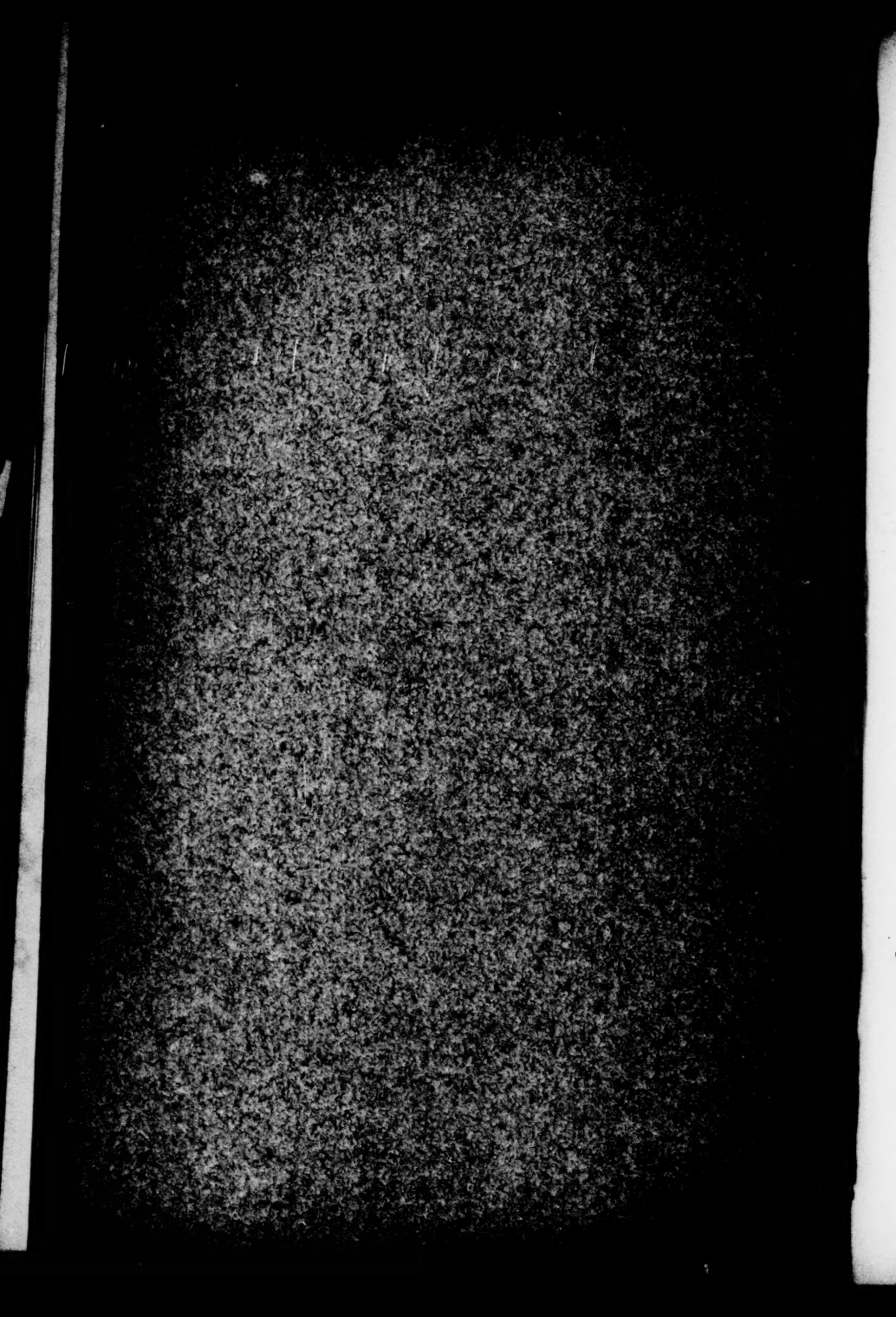
THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Motion to Dismiss or Affirm.

EDWARD A. GRAHAM,
L. A. SHAVER,
Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 533.

J. S. WINTER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Motion to Dismiss or Affirm.

The defendant in error moves the Court to dismiss the writ of error in the above-entitled cause for want of a Federal question, and unites therein a motion to affirm on the ground that, even if the Court has jurisdiction, it is manifest that the writ of error is taken for delay only, and that the question on which the jurisdiction depends is frivolous.

EDWARD A. GRAHAM,
L. A. SHAVER,
Counsel for Defendant in Error.

Messrs. WINTER & WINTER,
Counsel for Plaintiff in Error:

Take notice that the above motion will be submitted three weeks from service hereof.

EDWARD A. GRAHAM,
L. A. SHAVER,
Counsel for Defendant in Error.

Brief for Defendant in Error in Support of Accompanying Motion to Dismiss.

The plaintiff in error filed in the chancery court of Montgomery county, Alabama., an original and amended bill against the defendant in error. The defendant made no answer to these bills, but moved their dismissal on the ground that they were "without equity." This motion was sustained, and decrees rendered by the chancery court dismissing the bills (Record, pp. 13, 14). On appeal to the supreme court of Alabama the decrees were affirmed by the judgment (Record, pp. 17, 18), now sought to be brought before this Court on writ of error.

It is alleged by the complainant in substance that the pavement adjacent to certain property in the city of Montgomery, Alabama, held by him as trustee of his wife, Mary E. Winter, had been taken up by him, the entire sidewalk excavated, apartments for business purposes constructed in the excavation so made, and a new pavement laid, and that this was done by permission of the city council of Montgomery (defendant in error) as evidenced by a report of a special committee, dated July, 1870, and made Exhibit "B" to the original bill (Record, pp. 9, 10). It is further set forth that after the complainant had been for many years in the use of the improvements so made, the city authorities removed the pavement and the structure underneath, filled in the excavation, put down a new and different kind of pavement, known as the "Schillinger pavement," and have since excluded the complainant from the use of the space underneath the pavement in connection with the building adjacent, and that great damage has resulted from these acts of the city authorities.

It appears, also, from the original bill that the city authorities committed the alleged wrongs complained of on

the ground, as they claimed, that the sidewalk was out of repair and dangerous for passengers, and that it could only be properly repaired in the way they had done; that complainant had several times during a period of more than a year attempted to make the repairs which had been suggested by the authorities, but that they had prevented his doing so in the way he proposed and had insisted on the old pavement being replaced by the "Schillinger pavement" in pursuance of an ordinance of the city council adopted August 18, 1883, and which is made Exhibit "C" to the bill. (Record, p. 10.)

The permission given for making the excavation, etc., made Exhibit "B" to the bill (Record, pp. 9, 10), is as follows:

"MONTGOMERY, ALA., *July*, 1870.

"The undersigned, a special committee on the subject, appointed by the city council of Montgomery with power to act, hereby authorize J. S. Winter, as trustee, etc., to *proceed* with the improvement on the corner of Court and Market streets, in said city, exhibited by the sketch annexed and according to the plan so exhibited, the same contemplating the excavation of the sidewalk around or bordering the store or building known as the 'Gindrat corner,' and the use below of the apartment thereby to be formed for business purposes, with entrances thereto such as are seen on the plan annexed; the sidewalk to be replaced to accord with the annexed plan with a *good and substantial pavement*, and the work so to be done with as little practical interruption to business as may be found to be practically expedient, and, after being commenced, to be finished without unnecessary delay."

(NOTE.—The sketch and plan of the improvement referred to above are between pp. 10 and 11 of Record.)

The following is the ordinance of the city council of August 18, 1883, made Exhibit "C" (Record, p. 10) to the bill:

"*Resolved*, That all pavements laid in future on Commerce street, Court square, and Market street, on Court and Perry between Washington and Monroe streets, and Montgomery so far southwest as Lee street, shall be in stone, of uniform

size as far as practicable, and not less than three by two feet, with upper surface chiseled to a plane, and all edges chisel-dressed and meeting the upper surface in straight lines, or in artificial stone or concrete approved by the council, and that *when any pavement on the streets or parts of streets above mentioned now laid in brick or other material than those mentioned gets out of repair it shall be taken up and relaid as above directed.*"

Among the errors assigned (Record, p. 17) on the appeal to the supreme court of Alabama from the decrees of the chancery court are the following:

"3. The court erred in not holding that the ordinance of the city council of Montgomery, as set out as Exhibit "C" to the original bill, *impaired the obligation of the contract* set out as Exhibit "B" to the bill.

"4. The court erred in not holding that the *acts* of the City Council, respondent, as set out in said bill, deprived the complainant and Mary E. Winter, the owner of the corpus, of the interest and property described *'without due process of law.'*"

These assignments of error, we presume, indicate the Federal questions, which it will be contended are raised in this case and on which an attempt will be made to predicate the jurisdiction of this Court. That the motion to dismiss must prevail, seems clear.

I.

In the first place, this Court has repeatedly asserted the rule—

"That to give it jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that 'its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.'" (*New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S., 18, and cases therein cited.)

In *Klinger vs. Missouri* (13 Wall., 257, 263) Justice Bradley declared the rule to be well settled that—

"Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, *or upon some other independent ground*, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one."

Conceding that a Federal question was raised and presented for decision to the supreme court of Alabama, its decision does not appear to have been necessary to the determination of the cause, and the judgment of that court affirmed the decrees of the court below on the distinct and *independent ground* that "upon no construction of the bill as amended can it be claimed that anything more is shown than the commission by the defendant of wrongs or torts involving damage to property," and that, there being for such damage a plain and adequate remedy at law, "the conclusion was inevitable that the bill as amended was without equity." (Record, pp. 17, 18.)

II.

The contention that the ordinance of the city council of August 18, 1883, Exhibit "C" to the original bill, was violative of a contract evidenced by the permit, Exhibit "B" to the bill, is untenable on many grounds:

1. As said by the supreme court of Alabama, when the case was before that court in a somewhat different aspect (*Winter vs. The City Council*, 83 Ala., 589):

"The exhibit" [Exhibit "B"] "does not possess any of the elements or qualities of a contract, and no extrinsic facts are averred which impart to it such force and operation. The

excavations were solely for the use and benefit of the owner of the property and of advantage to him, without consideration of any benefit to the public. * * * The exhibit merely shows permissive authority, a license revocable at will."

2. If Exhibit "B," as construed by the complainant, had the elements of a contract in other respects, it would be of no binding force because *ultra vires*. By section 14 of the act to incorporate the city of Montgomery, passed December 23, 1857 (Exhibit "A" to the original bill, Record, p. 9), the city council of Montgomery is empowered to enact such laws and regulations "as may be deemed necessary in relation to the streets and highways" of the city. Under this authority the *duty* is devolved upon the city council to see that the sidewalks are kept in good condition, to regulate their repair, and to make necessary or proper changes in the character of the pavements to be used, and the discharge of this duty is essential to the safety and convenience of the public. A corporation can make such contracts only as are authorized by the act of incorporation. It certainly cannot by contract divest itself forever of a power granted in the interest of the public and necessary to the discharge of its duty to the public. The right to exercise chartered powers in the interest of the public is impliedly reserved, if not otherwise expressed, in every grant of privilege to private individuals. (*Winter vs. City Council of Montgomery*, 83 Ala., 589; *Gorzler vs. Georgetown*, 6 Wheat., 597; *Reading vs. Commonwealth*, 11 Penn. St., 196; *Louisville City Railway Co. vs. Louisville*, 8 Bush., 415.)

3. Exhibit "B" is not open to the construction put upon it by the complainant. His idea seems to be that the words '"the sidewalk to be replaced with a good and substantial pavement"' did not refer exclusively, as is manifestly the case, to the pavement then to be laid, but gave him the right for all time to determine what the character of the "good

and substantial pavement" should be. Under any reasonable construction of Exhibit "B" there is no conflict between it and Exhibit "C," and hence no question of the impairment of the obligation of a contract is presented.

III.

The phrase "due process of law" occurs in the fifth and fourteenth amendments to the Constitution.

The fifth amendment, it is held by this Court, must be understood as restraining the power of the General Government and not as applicable to the States (*Barron vs. Mayor of Baltimore*, 7 Peters, 243; *Withers vs. Buckley*, 20 How., 84; *Pumpelly vs. Canal Co.*, 13 Wall., 166; *Eilenberger vs. District Court of Plymouth Co.*, 134 U. S., 31). The fourteenth amendment declares that no *State* shall "deprive any person of life, liberty, or property without due process of law," and it is this amendment, doubtless, which is invoked by the complainant.

It is not charged that any act of the legislature of Alabama or ordinance of the city council of Montgomery, which appears in the record, is not "due process of law." Such a charge, if made, could not be sustained. The act incorporating the city, Exhibit "A" to the original bill, and the ordinance of the city council, Exhibit "C," passed under authority derived from that act, are certainly not open to such objection. The fourteenth amendment was not intended to interfere with the police power of the States. (*Powell vs. Pennsylvania*, 127 U. S., 678.)

The averment is that the "*acts* of the city council as set out in the bill deprived the complainant and Mary E. Winter of the interest and property described without due process of law." The ordinance, Exhibit "C", does not provide the mode of its enforcement, and the record in this case does not contain any ordinance in relation thereto. It is alleged in paragraph 6 of the original bill (Record, p. 5)

that the city council passed, in secret session and intentionally without notice to complainant, an ordinance, and that the "street forces" employed by the city council, "acting under its orders and commands *as expressed and declared by said ordinance*," committed the acts complained of. This ordinance is not set out and none of its provisions are given. It cannot, therefore, be determined from this record whether it provided for due process of law or not. The presumption is that it did, in the absence of proof to the contrary. The alleged fact that it was passed without notice to the complainant is immaterial, if it in fact provided for due process of law. If it be permissible to refer in this connection to the case of Winter *vs.* City Council, 83 Ala., 589, it will there be found that the city acted in accordance with the provisions of an ordinance providing for due notice to the complainant and for due process of law in all respects as applicable to such cases.

The fourteenth amendment is a guaranty of protection against the acts of State governments. "Individual invasion of individual rights is not the subject-matter of the amendment." (*Civil Rights Cases*, 109 U. S., 3; *United States vs. Harris*, 106 U. S., 629.)

Respectfully submitted.

EDWARD A. GRAHAM,
L. A. SHAVER,
Counsel for Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 613.

J. S. WINTER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF MONTGOMERY.

In Error To the Supreme Court of the State of Alabama.

MOTION TO DISMISS OR AFFIRM.

Brief in Opposition to Motion.

H. F. PAINE,
J. S. WINTER,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 528.

J. S. WINTER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF MONTGOMERY.

IN ERROR, "TO THE SUPREME COURT OF THE STATE OF ALABAMA."

PLAINTIFF'S BRIEF

In Opposition to Motion to Dismiss or Affirm.

The motion in this case, is in the words following, to-wit: "The defendant in error moves the Court to "dismiss the above entitled cause, for want of a FEDERAL "QUESTION; and, unites therewith, A MOTION TO AFFIRM, "on the ground, that, even if the Court has jurisdiction, "it is MANIFEST, that, THE WRIT OF ERROR IS TAKEN FOR "DELAY, ONLY; AND, that, THE QUESTION ON WHICH THE "JURISDICTION DEPENDS, IS FRIVOLOUS."

If, on the other hand, the Court has in fact jurisdiction and so decides, the alternate motion must fail, in that, it thereon becomes an application, in effect, to have the case—contrary to the usual rule—forwarded on the docket, and so heard, in advance of its number, *on its merits*, without, of course, benefit of the oral argument, usually assumed, to be more or less helpful.

So viewed, it is respectfully proposed to limit our presentation, *to the question of jurisdiction*, as the only matter of rightful inquiry in this motion, under our objection—if the Court pleases—to the Courts consideration of any other at this juncture of the proceeding; and, to insist in that behalf, that tested by the decisions adduced, the case discussed, is, undeniably, within the requirements of the rule conferring the controverted jurisdiction.

Thus—to quote from the (at least ingenious) brief of the opposing counsel—"to give the Court jurisdiction of a writ of error to a State Court, it must appear, affirmatively, not only that a Federal question was presented for decision to the highest Court of the State, but, that its decision was necessary to the determination of the cause, and that it was actually decided." "Or that the judgment, as rendered, could not have been given without deciding it." "(N. O. Water Works Co. vs. Sugar Refining Co., 125, U. S. 18, and cases cited.)"

Again, in Klinger vs. Missouri, 13 Wall, 257, 263, Justice Bradley says the rule is well settled, that "where it appears by the record that the judgment of the State Court might have been based, *either*, upon a law which would raise a question of repugnancy to the Constitu-

tion, laws, or treaties, of the United States—or upon some other independent ground—AND, *it appears that the Court did, in fact, base its judgment on such independent ground,* AND *not, on the law raising the Federal question*—this Court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one."

Taking, then, for our guide, the law of the case as presented by the seemingly unanswerable decisions so quoted, it is respectfully maintained—

I. That the case made in the State Court presents a Federal question, for decision, first, to the Chancellor, and, thereafter, to the highest Court of the State having jurisdiction; and that its decision was accordingly necessary to the determination of the cause; and that it was, actually, considered by and decided by both Courts, as every feature of the case, surely, denotes.

II. That while it appears by the record, that the judgment of the State Court might have been based, either upon a law which would raise a question of repugnancy to the Constitution of the United States, or, upon some other, independent, ground, *it does not appear,* that the Court *did, in point of fact, base its judgment on such independent* ground, AND NOT on the law, *raising the Federal question*; as being under the authority quoted, indispensable to the lack of the jurisdiction of the Court, n the cause before it.

III. That if right in this, our case is complete without further presentation, we venture to assume, and it

were therefore unnecessary for us to notice the position of the learned counsel opposed, that the case made by the record is "taken for delay only, and that the question on which the jurisdiction depends is frivolous."

Treating, however, the objection quoted, with the needed courtesy, we beg to point, in reply, to the record, and its unchallenged averments, of wrongs which nothing that we might or could say, would fitly picture, and the recitation of which, in the record, therefore, best speaks for itself.

IV. As to the averments relied on by complainant to support the claim of "a Federal question presented by the proceedings in the local court," we would refer, if the court pleases, to the complaint as exhibited by the defendant in error, as showing everything necessary in that behalf; while, to repeat, insisting, that the inquiry *in this motion*, may not consistently be extended to questions of merit of the case as a whole; this being under the practice of the court, allowable as a rule, only upon due submission of the case on its merits.

V. As the "*summum bonum*," however, of the case before the court, more broadly viewed, there can be no escape from the rule which insists, that, "if it appears from the record, however deduced, that, a *Federal question, was in point of fact*, raised by the complainant—and this of course is apparent—it will be assumed—that the court, as in duty bound, considered and decided it.

And thus, that the case, *was not decided upon independent grounds alone.*

But, as independent grounds are also shown to have been raised by the record—and, under a like rule, must, be

presumed to have been decided—the conclusion would appear to be, "that the judgment was on the fullest consideration of both the local and Federal questions, raised in the proceedings, which the court is petitioned to review; the evidence of a Federal question being raised, in terms, by the court below, appearing on page 7 of the transcript supplied by the movants. Thus—"and complainant charges that the said sidewalk or ordinance was arbitrary and without reason; was an evasion of natural no less than the Constitutional .. rights—guaranteed by both the Federal and State Constitutions of the citizen, who is bound to keep in good order the sidewalk of his building on the street," etc.

While, again, on the same page lower down and in Sec. XI of the complaint is the following—"that the effect of the ordinance, or its intended effect, was to make nugatory and so impair the force of the contract evidenced by Resolution or Ordinance, a copy of which is appended marked, Exhibit C, and under which the *Agreements*, so set out were made and entered into—*and by which they were evidenced*—in violation of the Constitution of the United States, etc.,—providing that "no State—hence no constituent part of a State—shall pass any law impairing the obligation of contracts; and so in violation of complainant's rights and the rights of the owner of the property aforesaid under said contract, guaranteed by both the Federal and the State Constitution," etc.

IV. While as to the question of merit as this concerns the averments of fact relied on to support the

claim of "*a Federal question presented by the record*," we beg leave to refer the Court, to the complaint in the cause, as showing every thing necessary in that behalf; while, however, venturing to suggest, at the same time, that the inquiry is not as to the merits of complainant's claim, "*that the facts, legally considered, raise a case, entitling him to relief*," but as we need not observe, though we may be pardoned for remarking, a case which rightly challenges the attention of the court addressed, and so calls for its decision "*after due hearing*," upon the yet further question of, "whether the plaintiff in error was entitled under the facts, to the relief asked in the court first addressed?

Asking reference to the record as presented by the movants, and especially to the copies of the decree of the Chancellor and the Appellate Court below, respectively, as showing that the adjudication was to the last degree, inclusive, therefore, not *perforce*, upon any question of the local law, only.

Respectfully, etc.,

H. E. PAINE,
J. S. WINTER,
As Counsel for Plaintiff.

ARGUMENT.

I. If at this stage of the case and against our own theories of the right of counsel, *to, in this motion, discuss it*, ON ITS MERITS, we may be indulged, in the following —and we may not, we admit, without the leniency of

the Court—it is respectfully submitted that the case presented by the pleadings in the State Court, is the long continued lawful use and occupation of a premise by and with the consent of the defendant — and, *under a distinctly set out agreement, evidencing it* by and between the complainant and the respondent, City Council acting therein, in point of fact and law—and as shown by the extract exhibited from the charter of the city—as the duly authorized agent of the State; and, thus, for the State. And, in respect to a matter of mutual concern, so entirely demanding its action as to subject it, should it refuse to act, to the force of the writ of mandamus, compelling its action as a quasi Court especially erected, to settle the constantly recurring question presented, to-wit—whether the highway reserved or dedicated to the city, would or would not, be obstructed by the proposed permanent improvement.

And with all the effect of a judgment without appeal; and, as a further feature of the case with all the effect necessary to stamp the resulting concession, as *Res Adjudicata*, and so determine relative rights, unchanging except by consent; and, unassailable as fixed.

II. That the object of the agreement and the authority to make it, was to advance the common good—to promote, in short, a laudable and lawful purpose and common object, to-wit—the better being of the city and its citizens, in common. While its consideration was a valuable one, however critically considered, if we are to heed the clear and comprehensive definition supplied in Heron vs. Hethrington. 57 Ala. 165,

to-wit: "That which creates some benefit to the party promising or causes some trouble, injury, inconvenience, prejudice or detriment to the promisee, is a consideration which will uphold a contract."

III. That the well pleaded charges of the bill of necessity treated as true under the motion to dismiss, for want of equity—show an agreement or understanding, within the clearly exhibited powers and authority of the counsel on the one side, in respect to matters of special delegation and duty undeniable, and the complainant on the other—which was long observed and effectively performed by both sides for the doing of, not only, certain specifically prescribed and accurately set out lawful things, but for the making of certain permanent improvements in, under and about a permanent and prominent building on a prominent, if not the most prominent-corner, of a State Capital;—and thus, for the doing of not only certain commendable things, but things the doing of which, it was plainly the purpose and palpable interest of both sides, to advance, and, of the State Legislature to authorize. And from which, was to and did accrue results palpably of common benefit as well as common interest.

And thus, the case presented by the facts, is wholly unrelated to and unaffected by, the decision in that of the city of Birmingham vs. ———.

That in that case as suggested by the unsurpassedly learned, and since, deeply lamented—and, as certainly never to be forgotten—Chief Justice Stone, the respondent was plainly on notice of the self-evident, and not to be evaded, truth, that he was on forbidden prem-

ises. That he was on property previously dedicated to the complainant in trust, and for the public use, as an unobstructed and *unobstructable* highway—to be thus and so preserved for the time to come. And, that he could under no facts.—*whether with or without the consent* of the *city of Birmingham*—as being entirely dissimilar to the attitude of the City Council, respondent, in this case!—occupy the particular premises concerned in derogation of the uses to which it had been so specifically and undeniedly as undeniably surrendered.

That the occupation shown, too, *was palpably an obstruction of* the easement, as in striking contrast with the occupation concerned in this case—hence, a nuisance, *per se*, from the beginning, throughout.

And could never, therefore, become a muniment of title, or be advanced as a possession, hostile to the complainant, to ripen, under the law, when so hostile to the law, into a title to be upheld by the law. And we can only commend the wisdom of the decision which so regards it, while insisting, as we most respectfully do, that there is no sort of—not the remotest—analogy between the two cases.

For surely, the case we discuss, is one of unmitigated—day by day, full continued—full grown wrong, unsparingly as pitilessly persisted in, when, is, so indisputably shown, its red-handed facts—facts which are in point of fact, indisputable as undisputed;—and thus, the uninterrupted, peaceable occupation and enjoyment, by common agreement and consent, for more than ten years previous—as the period of adverse possession in Alabama, barring, even, the true owner—of the

generously improved premises concerned, lawfully in the possession and use of the complainant, by and through the lawfully conceded and specially authorized consent of the respondent; and with it *complainant's* forced *eviction. under such facts*, without a moment's previous notice; and, too, without trial had! Though with all the hurt and injury to be bettter imagined than described! And especially, when considered that the eviction so summarily effected, was perpetrated under an ordinance of the City Council respondent, of which a copy appears, *post*, surreptitiously passed in open abnegation of respondent's plainly evidenced agreement and contract, to keep and hold the premises so conceded to complainant's use and occupation and uninvaded enjoyment, not for a day, simply—for, every conclusion of reason, forbids it!—but for the term and time impliedly, that it might or would serve, or be made to serve the particular objects of the particular concession;—and as deduced from the, to repeat, unassailable as unchallenged averments of the bill.

That so regarded, the ordinance so set out was, practically, the sort of legislation—indirectly effected with as much effect as if directly done—that the framers of the Federal Constitution, plainly intended to interdict in using the words—"*No State shall pass any law imparing the obligation of contracts.*"

And which both Constitutions—the Federal and the State, alike—as plainly purposed to accentuate, in providing—that, "No person shall be deprived of life, liberty or property, without due process of law,"—as bearing upon the more than unceremonious seizure com-

plained of and which at once followed, the Constitutionally forbidden ordinance, set out.

The case, however, is self-speaking and the law upon the facts, even more plainly, tells of abuses to be redressed—and which are, at the same time, practically, without adequate remedy—if our petition is not rightly to the Chancellor of the division, we ventured to petition. And, Courts of Chancery, the boasted inheritance of a free government, fall short of what is necessary to their highest usefulness, if it be indeed true, that they are so entirely crippled in their high functions, by arbitrary rules of practice, as to be unequal to the demands of the case considered.

While it is no less true, that if the grievances complained of, had their redress in courts of law, only, the remedy, under the facts, would be worse than the disease—that the demands of a practice, that would impose conditions of relief so barren of every element of that complete and ample redress which the law contemplates in prescribing the remedy, whatever the wrong—"*Ubi jus, Ibi Remedium*,"—would be without the sanction of reason—the opponent of right, and the confrere of evil. While surely, such a case is scarcely to be treated as insisted by the learned counsel for the motion—as being on its face—*frivolous!*

EXHIBIT A.

COPY OF THE CHANCELLOR'S DECREE, APRIL 10, 1889.

In Chancery at Montgomery, Alabama, Spring Term, 1889.

"This cause was submitted for decree at the present term of the Court, *on the motion of the defendant to dismiss the bill for the want of* equity, and on consideration it is ordered, *that, there is no equity in the bill;* the same is hereby dismissed out of this Court."

The bill depends for its equity, on two propositions.

It seeks to compel defendant, *to restore the sidewalk to the same condition in which it was, before it was filled up and covered*, by order of the defendant.

"In deciding whether complainant is entitled to have this done, the Court, *on this motion*, cannot look outside the bill and the ordinances, and other exhibits of the bill. *It does not seem to the Court, that* when regard is had to *all the findings and ordinances of the council*, we *can conclude, that the action of the defendant was, an arbitrary and unreasonable exercise, of the discretion given by law over the streets and sidewalks of the city.*"

On same page of record of transcript, the following, as Decree No. 2, appears—under date of, April 11, 1889.

IN CHANCERY AT MONTGOMERY, ALABAMA,

SPRING TERM, 1889.

J. S. WINTER VS. THE CITY COUNCIL OF MONTGOMERY.

The complainant makes application to the Court for leave to file an amendment to the bill after setting aside the decree rendered at the present term of the Court, *on motion, to dismiss the bill for want of equity.*

Upon examination of the proposed amendment, it appears that there would be no equity in the bill, were the same filed.

In order that the complainant *may have full benefit* of the bill, as amended, it is hereby ordered that complainant be allowed to file said amendment, and, for that purpose, *the decree is set aside and vacated.* And now, on consideration, *of said bill, as amended,* it is ordered, adjudged and decreed, that, *there is no equity in the bill,* and, *the same is hereby dismissed for want of equity.* The only additional matter introduced as a reason for retaining the bill, consists in the charge, that defendant has committed and threatened to commit a trespass upon complainant, by refusing to allow him to make openings in a wall on the sidewalk, or near thereto. It does not appear that such a trespass is such a one as is of irreparable injury to complainant, AND, *such a one, as under the charter and ordinances of the city, they have not the right to do in the exercise of the power conferred on the City Council.*"

While the distinctest reference by the Chancellor appears, when, in his first opinion—(distinctly endorsed in all respects in his second)—he says—"It does not seem to the Court, that when regard is had to all the findings, &c., we can conclude that the action of the defendant, was, *an arbitrary and unreasonable exercise* of the discretion given by law, *over the streets and sidewalks of the city.*" While again, the courts disregard of assignment of errors in the appellate Court, duly regarded, seem to show the literally unqualified endorsement of the action of the learned Chancellor, by the said Supreme Court, in its length, breadth, and thickness, and throughout, and is therefore conclusive, we assume, upon the question,—"whether the Federal question, so, patently, raised throughout, escaped the notice, after all, of the eminently able and deeply learned State Court of last resort, reviewing the case, so on appeal"—the following, being a copy of the surely remarkable, if not, "passing strange"

ORDINANCE, SHOWN AS EXHIBIT C.

"CALLED MEETING CITY COUNCIL, AUG. 18, 1883."

Present—His Honor the Mayor—Aldermen W. B. Jones, Hannon, T. H. Carr, Thomas G. Jones, Sharp, Fleming and Williams. Alderman Thos. G. Jones in the chair.

His Honor, the Mayor, offered the following ordinance:

Resolved, That all pavements laid in the future on Commerce Street, Court Square and Market streets; on Court and Perry between Washington and Monroe Streets, and on Montgomery so far southwest as Lee Streets shall be in stone of uniform size as far as practicable dressed to a plane, and all edges chisel-dressed and meeting the upper surface in straight lines, or, in artificial stone, or concrete approved by the Council.

On motion the rules were suspended and the ordinance was put on its final hearing. On motion of Alderman W. B. Jones, the ordinance was adopted.